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MISAPPLICATION
OF PRESS, RADIO AND CINEMA
AND THE FIGHT AGAINST IT.

Paper presented to the IInd Conference for Comparative Law, Hague 1937

by

von Hofmannsthal, lawyer, Vienna
and
P. Smolka, correspondent, London.

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Misapplication of Press, Radio and Cinema;

And the fight against it.

I. Introduction.

The Press, the Radio and the Cinema are the three great publicity powers of our time. Against them the individual is socially and economically powerless. The more dangerous a weapon is, the more cautiously it must be handled. And for this reason, that these forces have another master over them, one able to subject them completely to its will: the State. Lack of consideration for the individual on their part affords the State an excellent pretext, and one easily approved by the masses, for giving ear to the cry for redress, and forging for them chains by means of which they are brought into their service. Consideration for the individual's rights means, therefore, self-protection for Press, Radio and Cinema; by restraining abuses of their own they remove the pretext for abuses being practised against them.

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II. Abuses.

A. Private Life.

The individual has a right to ensure, that publicity should not intrude upon his private life. This right lapses only when the individual violates the rights of another by committing a crime, or becomes the representative of the rights of another by entering on a particular office. It is an abuse for publicity to occupy itself with the private affairs of a defendant, other than those connected with his crime; or with the private affaires of an office-holder, other than those that regard his function. And the abuse does not cease to be an abuse because the curiosity of the masses cries out for such pieces of news. Here vanishes lawful interest, which is considered by most laws as the limit. This opinion is specially sustained by the Swiss Literature on art. 28 Civ. C. (Egger) and the French jurisdiction on art. 1382 Civ. C. Such excès d'intérêt is only to be permitted when the consent is obtained of the person concerned. Or, more correctly, of the persons concerned; for in many cases there are more than two people involved in any 'private life'.

The artist must submit to the Press criticising his productions praising them or blaming them; to its discussing where and how he acquired his talents; whether he is acting socially by exploiting them, and if so, how. But he is not bound to submit to the Press conducting inquiries into his married life, discussing (without the consent of all concerned) his private affaires, finding out where he buys his clothes and how much he pays for them. The Cinema may present a picture of a Cabinet-Minister at the opening of an exhibition, but may not (without the consent of all concerned) show him enjoying a car-ride in the company of his friends. An M. P.'s speech may be broadcast but not a private business-letter of his. This also holds good for the man who comes into conflict with the law. The publicity of court-proceedings, in both civil and criminal cases one of the most important guarantees of legality,

is not secured by the one or two haunters of the law-courts, but by the presence of the Press. The Press is the guardian of this important legal guaranty, and may not administer it improperly. When statements come out in court which overstep the limits of the actual charge and encroach on the defendant's private life (a thing which cannot always be avoided), the Press may not divulge them. A man who has brought an action for damages received in a motor-car accident must not allow the name of the lady in whose company he was making his nocturnal trip to be published; for otherwise the mischief caused might reach far beyond that occasioned by the car. Every barrister knows how defence is sometimes barred by such dangers. By passing over these matters, the Press is directly serving truth and right.

From this it follows that the Press, the Radio and the Cinema, may not (without the permission of the persons concerned) publish news or pictures of private or family life.

B. The Duty to Truth.

The right to publication is possessed by the three forces of publicity mentioned in the spheres of public and professional life, and in the sphere of private life when consent is given, but they may not publish anything inaccurate. As their conditions of work, particularly those of the Press, do not permit them to make extensive researches before publication, they may overcome the difficulty by simply suppressing the story. The conclusion is, then, that every person concerned has the right to demand that nothing wrong shall be published and that anything published in ignorance shall be corrected. This rule is also applicable to the Radio. For the Cinema only the destruction of the film or the defence of its reproduction can be considered.

It is not possible to enter here into the details of the application of this right to truth and to correction of untruth. One important distinction must, however, be drawn; and it is one which is decisive for the choice of the means of redress. Intentional falsehood demands vigorous legal reprisals (for general prevention and deterrence). Unintentional falsehood demands such measures as will restore the injured party's right,—but without preventing quick reports. (See pag. 10.)

It is understood that this right to truth extends to all the spheres of action open to publicity. Particulars of private and family life, even if true, may not (without consent) be published.

Some countries go so far as to forbid the publication of certain true facts. Thus, in Czechoslovakia, it is, in the case of certain serious crimes, illegal for the Press to publish a picture of the criminal within a year after the crime has been committed. It might even happen that an editor could be convicted, and the actual doer of the deed acquitted, on the grounds e. g. of his not being in full possession of his faculties. So that if anyone were to make an attempt on the life of the President of Czechoslovakia, the Czechoslovak public would not be allowed to see a portrait of the man. The idea that lies at the bottom of this prohibition, that of educating the masses, could be stronger realised in the sphere of the Cinema than in the sphere of the Press.

C. The Right to Criticism.

If the facts are free to be reported, and if they are accurately represented, they stand open to discussion. The right to criticism, however, does not include the right to defame. Defamation by form is unconditionally prohibited; and defamation in the matter in so far as it is not necessary to critical treatment. Therefore,

when a newspaper prints a fair and accurate report of an event that is open to publication, it may describe it as bad and pernicious, even make fun of it. By following this course it leaves its readers to form their own judgement, to regard it as bad and pernicious also if they wish. The Press may guide its readers' judgements, but may not mislead them with falsehoods; by suppressing the facts it would fail in its duty of accurate publication.

The right to criticise diminishes in proportion as the organ of publication acquires increased monopoly. In commercial as in public life, free competition gives rise to rights; the position of monopoly imposes restrictions. In business life the consequence of monopoly is the obligation to contract; the monopoly of public opinion should impose a moderation of critics up to abstinence. When a number of free periodicals exist, a man attacked in one can easily find another to support him. In political, sociological and artistic questions, criticism of one party necessarily implies praise of the other. The publicists' sense of deceny commands consideration of the unprotected and undefended situation of the person discussed. The existence of monopoly, or of complete co-ordination prohibits attacks on a man incapable of defending himself; it therefore puts a damper on criticism and demands full documentation. This applies principally to broadcasting; but also to journalism and particularly so when the number of newspapers or their circulation is limited. We reach the conclusion then, that the freer the Press,—the fewer the restrictions imposed on it from above, and the less its expressions of opinions are controlled,—the freer may its criticism be. Only a free Press can criticise freely; an unfree Press must keep its criticism within bounds.

D. Propaganda Campaigns—National and International.

It would be unjust and retrogressive to prohibit the use of exlposives. Even mining and building would suffer an unexampled setback. Yet it is found right to subject the trade in explosives to stringent precautionary regulation. The great publicity forces are the explosives of the mind. The mischief they may do within and between states by inflaming—instead ot guiding—public opinion, is incalculable. Nothing less than incitement to mass-murder, be it progrom or war, lurks behind this misuse of their powers. One may recall in this connection the legal definition of "Vandalism" and "Barbarism" coined by Dr. Lemkin of Warsaw, at the Congress for Criminology in Madrid. A State consists of a synthesis of national, religious and social groups, as the body consists of several members. The doctor who treated the limbs in such a fashion that they hindered one another's movements, injured and crippled each other,—instead of supporting them and developing them equally on all sides—would be a criminal. The same reasoning, strengthened by the magnitude of the risks involved, holds good for the intercourse between states which, owing to the progess of technology, have been constrained to a continually closer and closer economico-political synthesis. This trend will not be arrested by hindering the trade in commodities, men and money, or by the obstruction and instigation of public opinion. Such methods will only force it from evolution into revolution, give it the action of an explosive, and thereby become the destruction of immeasurable wealth. The question is whether this development is to be allowed, or whether it is to be avoided. If the answer is 'to be avoided', then Press, Radio[1]) and Cinema, this three above all, must be prevented from taking part in national and international campaigns of propaganda and instigation.

It should not go unmentioned that as early as 1852 the old Criminal Law of Austria, in paragraph 302 (Incitement to hostility

[1]) Cf. Resolution of the Intern. Broadcasting Union of may 13th, 1933.

against nationalities, religious communities, corporations etc.), par. 303 (Attacks on the established church or on recognised religious societies), par. 305 (Public defamation of the institutions of marriage, the family and private property; or the commendation of illegal or immoral practices) included provisions of great value which reoccur, in similar form, in many other laws. Of course, in order to work to salutary effect, such regulations must be enforced, and not against comparatively harmless utterances only.

III. Defensive Measures.

Suppression and prevention bear the same relation to each other as do Law and Custom. Prevention is preferable to suppression,—and yet the science of medicine is much further developed than that of hygiene.

A. In National Law.

The limits to publicity marked out above are to be preserved through the vigilance of the law-courts. Of which law-courts?

A certain principle has been drawn from one of the most highly-developed parts of international law,—that relating to intangible rights (Immaterialgüterrecht), ranging from patents to unfair methods of competition. It is this: *deliberate overstepping of the limits is to resisted by criminal law, unconscious overstepping by civil law.*

The authors are convinced that the application of this principle to the right of publication is imperative.

In most codes, with the exception of Anglo-American law, the law relating to the rights of the Press,—this alone has been brought to any considerable development,—has been included under the heading of the criminal law. And there it necessarily came to grief on the question of the satisfaction of honour, with which it is chiefly concerned. For every good criminal law must have in its focus the guilt of the accused; whereas a good protection against injuries to honour must have in its focus the innocence of the complainant. So the accused must be acquitted if it can be shown that he acted neither intentionally nor negligently; and the guilt of the complainant is inavoidably but unjustly inferred from the acquittal of the defendant. If, in order to avoid this effect, the definition of negligence were to be extended too far, the freedom of the press would again be endangered.

The system was wrong. Offended honour was obliged to seek other paths to satisfaction; and often it followed false tracks, such as the attack and the duel. These, also, were just as unsuccessful in attaining the aim—that of proving the innocence of the injured party.

It is a different matter when a sharp distinction is drawn between the procedures of the civil law and of the criminal law. A man who wittingly oversteps the limits is punishable as a criminal; a man who oversteps them unwittingly is required to make retraction and reparation. There are other less essential details, into which it is not possible to go within the compass of this brief and introductory work,— e. g. the question of how negligence and the amount of reparation are to be measured.[2])

Suppression by the civil law of any overstepping of the limits to publicity, works to good effect. What it lacks is the danger, the odium and the risk that attaches to a penal prosecution. In order to win his case, the complainant has not to use all the means at his disposal to prove the g u i l t of the accused; and judgement is less distorted by any moments of emotion the defendant may have been clever enough to arouse. On the other hand a civil action, accompanied by publication of judgement and heavy costs acts also as a strong preventive. Here it must be remarked that, even those countries which, like Denmark and some states of the U. S. A., refuse costs to the winning party, must reform this system (at least in this procedure). Non-payment of costs would place a premium on the offence, and would hinder a poor man in the prosecution of his rights.

Where the injury complained of falls not on single individuals but on unorganised groups,—particularly in the cases of propaganda

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2) For right to retraction and reparation even when the defendant acted in ignorance, justified by the fact that he should have known the truth facts of the case, see Supr. C., Vienna, December 11th, 1936; also, for the choice between civil and criminal procedure, in a case in which the deed was deliberate, see the same Court, November 24th, 1936.

campaigns (See Section II D) or of the broadcasting of inaccurate facts,—right of action shall be granted to each member of the group[3]), with safeguards against multiplication of actions on the one hand and collusion on the other. For this parallels are to be found in the actions of minority share-holders in company-law[4]).

This approach is also adapted to dealing with publications, which are inaccurate but not defamatory, and with misuse of a person's name unaccompanied by an intention to cause injury. Here the two systems go entirely different ways.

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3) National laws are dealing in a very different way with the question, who is entitled to sue or prosecute in cases of injuries to groups. We give a small selection:

Yes.	No.
A. Each member of the group.	
Canada (Bill Hyman apr. 7th, 1934)	Austria
Cecoslovakia	Danzig
Hungary	Norway
Poland (Supr. C. O. S. 64/1934)	Zurich
Roumania	
Yougoslavia	
B. An organised representation of the group.	
Norway (§§ 246, 247 P. C., Urbye S. 13)	Austria
Roumania	Cecoslovakia
	Poland
	Yougoslavia
	Zurich

C. The State.

Austria (§§ 302 ff P. C.)
Brazil (§§ 14-17, 20 ff. Law of apr. 4th 1935)
Cecoslovakia (not against foreign groups!)
Netherland (art. 137c, d, 147a P. C.; very appropriate decree of introd. aug. 15th, 1934)
New Jersey (cf. stat. draft introd. by Mr. Stout on febr. 19th, 1934)
New York
Norway (§§ 135, 142 P. C.)
Roumania (lex Marzescu 1924)
Union of S. Africa (Rex ca Inch febr. 2nd, 1935)
Yougoslavia

4) Cf. sect. 222 PGR of Liechtenstein and art. 754 of the recently introduced Swiss Law of Obligations.

In England, anyone who has read his name in a novel has a title to reparation, which must be bought from him at a considerable price; and this even when no other reader of the novel has, or possibly can have, thought of him. The Austrian Supreme court decided however on November 10th, 1936 (Rspr. 34/1934. See particularly the observations there on choice of procedure) that even the bearer of an unusual name which had been used for a comic character in an advertisement, could do nothing. The right road lies between these two extremes.

Injuries to private persons are to be left to private actions; injuries to the public power,—particularly those mentioned in Section II D (campaigns of propaganda and instigation)—are to be prosecuted by the State. Any bias on the part of the Public Prosecutor is to be corrected by the subsidiary right of complaint possessed by the persons or the groups concerned. (For right of bringing actions, see above.)

There is not much to be said against state censorship as such; it may be the means of preventing harm. How far it may go in its encroachments depends on the political structure of the state concerned.

The protection of public officials from blame and criticism should not be overdone. Criticism is necessary to the supervision of their work. Overdevelopment of this privilege through legislation is a sign of deficient selfknowledge of the officials themselves, as well as mistrust in them. And it is invariably the comunity that suffers. Absence of criticism debilitates, and indicates an apeing of divinity which is to none more dangerous than to Caesar.

B. Under International Law.

All international conventions will remain imperfect so long as they are not protected by international tribunals. Briefly, the

international system must bear the same relations to the law-courts of the various nations, that the Federal Courts of the U. S. bears to the courts of the different states. To be sure, this necessitates some bearer of international justice. Well, there it is: the League of Nations. The Hague Court of International Justice is not sufficient. It should only be the apex of an international system made up of regional international courts which could be summoned easily, quickly and at little expense.[5])

Forces of publicity which transgress international rights must be amenable to this international court, under both civil and criminal law; the court must also be able to deal with less important actions, in the event of a breakdown of the national courts. As regards the international action of the great publicity forces, this only appears to be necessary to the furtherance of special aims, particularly in international propaganda-campaigns, press-feuds, etc. In the event of an inadmissible piece of propaganda against one state being broadcast by another, or in the event of a film shown in one country inciting another against a third, the judgement of an international court would be incomparably more effective than any appeal to national courts. Difficult of attainment? Who wills the end must will the means.

C. Self-assistance by the organisations themselves.

We think more highly of determent than suppression. At their most efficacious, suppressive measures are a "fleet in being"; they are so, not because they are employed, but because they can be

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5) Cf. Bellot's plan for an International Penal Court, International Law Association, Vienna, 1926, and Warsaw, 1928; Hofmannsthal's report to the Congress of the International Law Association, Buenos Aires, 1922, on the protection of minorities.

employed. The method of prevention, of course, is even better.

The leaders of opinion-newspapers, film-studios, broadcasting-stations, - could prevent much harm by forming committees of their finest judicial and legislative talents. Such committees would draw up rules, directed against the overstepping of the limits marked out above, and see to it that they were kept. Fair, unbiassed rules they should be, applying without distinction to everyone working in a particular form of publication. Naturally, one journalist must not be debarred from a practice permitted to another. And rivalry in the overstepping of the limits must be made impossible. In the event of unjust restrictions or penalties being imposed by these committees, the road is always open to the national and international courts of law.

To be really effective, the various committees would be forced to link up with international organs for promoting mutual understanding; and for this reason also, to overcome the difficulty of the differences between nations, and particularly between their legal systems. By this means, an international "self-assistance" office would be brought into being, similar to that suggested in Section III B for the redressal of national grievances.

IV. Conclusion.

We reach therefore the following guilding principles:

1. Publication of material from private life may not be made without the consent of the persons concerned. (II A).
2. Inaccurate facts may not be published. The persons concerned have the right to correction in the same medium as that in which the mistake was first published, and to a safeguard against repetition of the mistake. (II B).
3. The facts that have been correctly represented may be commented on in whatever way is preferred, but not so as to cause injury. Freedom of criticism is restricted to the limits of the freedom of the Press. (II C).
4. Instigation of groups within the state, and between states, is prohibited.
5. When these limits are unwittingly overstepped, the remedies of the civil law are prescribed; when wittingly, those of the criminal law.
6. The formulation and supervision of professional rules of conduct by the organisations themselves is desirable, but the rules imposed must apply to all alike. In the event of these supervisory committees exceeding their powers, the road lies open to the national (5) or international (6) judge.
7. As regards the international operation of the Press, Radio and Cinema, it is, in accordance with the view expressed here, to be placed under the jurisdiction of new international courts yet to be created. (III B; C end).

The authors are conscious of the extremely rudimentary character of this essay. But the problems before them require for thorough treatment not a small essay, not even a fat volume; they require a whole library. Their ambitions therefore rise no higher than to a modest collection of hints on the subject, and they would consider themselves happy if these were thought suitable of furthering the end—that of lessening the dangers from the three great publicity powers of the Press, Radio and the Cinema, and of strengthening their freedom.

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